



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

VIA Facsimile (202-429-3301) and First Class Mail

JAN 15 2013

Matthew T. Sanderson, Esq.
Caplin & Drysdale, Chartered
One Thomas Circle, NW, Suite 1100
Washington, D.C. 20005

RE: MUR 6112
McCain 2008, Inc.

Dear Mr. Sanderson:

On August 24, 2010, the Federal Election Commission found reason to believe that John McCain 2008, Inc. and Joseph Schmuckler in his official capacity as treasurer ("McCain 2008") violated 2 U.S.C. § 441a(f) of the Federal Election Campaign Act of 1971, as amended ("the Act"). On January 8, 2013, the Commission also found reason to believe that McCain 2008 violated 2 U.S.C. § 434(b). Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determination regarding the Section 434(b) finding.

13044341597

13044341598

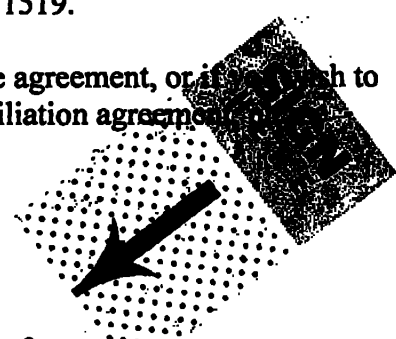
13044341599


In the meantime, this matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. Please note that McCain 2008 has a legal obligation to preserve all documents, records, and materials relating to this matter until such time as they are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519.

If you have any questions or suggestions for changes in the agreement, or if you wish to arrange a meeting in connection with a mutually satisfactory conciliation agreement, please contact me at (202) 694-1650.

We look forward to your response.

Sincerely,




Cynthia L. Bauerly
Commissioner

Enclosures:
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: John McCain 2008, Inc. and MUR: 6112
Joseph Schmuckler in his
official capacity as treasurer

I. INTRODUCTION

In August 2010, the Federal Election Commission ("Commission") found reason to believe that John McCain 2008, Inc. ("McCain 2008") violated the Election Campaign Act of 1971, as amended, (the "Act") by accepting an unknown number of excessive contributions in violation of 2 U.S.C. § 441a(f) during the 2008 primary election period in violation of 2 U.S.C. § 441a(f). See Factual and Legal Analysis (Sept. 13, 2010) ("F&LA").¹ Relying on information compiled by the Reports Analysis Division, the Commission found that McCain 2008 may have accepted between \$3.5 and \$5.7 million in excessive contributions. The Commission also found that McCain 2008 may have misreported the original date of receipt for certain primary election contributions made through its various joint fundraising representatives resulting in those contributions appearing to have been "primary-after-primary" excessive contributions (*i.e.*, primary contributions made after the date of the primary election).² F&LA at 4, n.2. Further, the Commission found that the Committee might have misreported additional primary contributions redesignated to the GELAC, which was established pursuant to 11 C.F.R. § 9003.3(a)(1). *Id.* The Commission authorized an investigation and a Section 437g audit to determine the extent of McCain 2008's violations.

¹ The Commission also found no reason to believe that McCain 2008 violated 2 U.S.C. § 434(b) by failing to disclose a \$56,047 contribution by Brian Medeska or violated 2 U.S.C. § 432(c) by failing to properly account for the receipt of anonymous contributions and maintain identifying information for other contributors.

² These joint fundraising committees were established pursuant to 11 C.F.R. § 102.6. Participants included McCain 2008, GELAC, the Republican National Committee, and various state party committees.

13044341600

In response to the Commission's findings, McCain 2008 stated that the campaign made memo entries and retained proof of contribution dates in the form of postmarks and other documents for all alleged primary-after-primary contributions made within the permissible time frame. Further, the Committee contended that any such contributions received after the permissible time frame were appropriately refunded or redesignated to the GELAC. *See* RTB Resp. at 1.

II. FACTUAL AND LEGAL ANALYSIS

A. Misreporting of Joint Fundraising Transfers

The investigation revealed that McCain 2008 failed to report correctly the original dates on which over \$22 million in contributions were received by McCain 2008's joint fundraising committees in violation of 2 U.S.C. § 434(b) of the Act.

The Act requires all political committees to publicly report all of their receipts and disbursements. *See* 2 U.S.C. § 434. Each report shall disclose for the reporting period and calendar year the total amount of all receipts and the total amount of all disbursements. *See* 2 U.S.C. § 434(b)(2), (4); 11 C.F.R. § 104.3(a), (b). The Act requires that an authorized committee of a candidate report the amount of all receipts from transfers by affiliated committees, as well as the identity of the affiliated committee and date(s) of transfer. *See* 2 U.S.C. § 434(b)(2)(F), (3)(D); 11 C.F.R. § 102.17(c)(3)(iii), (c)(8)(i)(B); *see also* 11 C.F.R. §§ 104.3(a)(4), 104.8.

Commission regulations permit political committees to engage in joint fundraising with other political committees or with unregistered committees or organizations. *See* 11 C.F.R. § 102.17. After a joint fundraising representative distributes the net proceeds, a participating political committee is required to report its share received as a transfer-in from the fundraising

13044341601

representative and also file a memo entry on Schedule A itemizing its share of gross receipts as contributions from original contributors as required by 11 C.F.R. § 104.3(a). *See* 11 C.F.R. § 102.17(c)(8)(i)(B). For contribution reporting and limitation purposes, the date a contribution is received by the joint fundraising representative is the date that the contribution is received by the participating political committee, even though the participating political committee is only required to report the proceeds once the funds have been transferred from the fundraising representative. *See* 11 C.F.R. § 102.17(c)(3)(iii), (c)(8).

During the 2008 election cycle, McCain 2008 received \$22,257,684.17 in transfers from six joint fundraising committees: McCain Victory Committee, McCain Victory 2008, McCain Victory California, McCain Victory Florida, McCain Victory Kentucky, and McCain Victory Ohio. These transfers were made on various dates between April 30, 2008 and January 7, 2009. McCain 2008 correctly reported the dates it received transfers from its joint fundraising representatives; however, the Committee did not correctly report the original dates on which the transferred funds were originally received by the joint fundraising representative, as required by 2 U.S.C. § 434(b)(2), (4); 11 C.F.R. §§ 104.3(a)-(b), 102.17(c). McCain 2008's use of the deposit date instead of the original receipt date resulted in the appearance in its disclosure reports that it had accepted millions of dollars of excessive contributions after the date of the candidate's nomination.

The Commission initially brought this problem to the attention of McCain 2008 in Requests for Additional Information ("RFAs"), which questioned a number of primary contributions that were identified as possibly excessive because the Committee received the transfer of funds after the date of the candidate's nomination. *See* RFAI (May 28, 2009), RFAI (May 29, 2009), RFAI (June 2, 2009), and RFAI (July 7, 2009). These RFAs sought

13044341602

clarification as to whether the contributions were incompletely or incorrectly reported. The Commission noted in the F&LA that certain excessive contributions may have been misreported as being received after the date of the primary. F&LA at 4, n.2.

McCain 2008 disputes that it misreported joint fundraising receipts. The Committee states that its use of the date of deposit as the date of receipt for these contributions on disclosure reports was both appropriate and consistent with Commission regulations. *See* Resp. to Notification at 2 (June 7, 2012) ("Resp. to Notif."); Supp. Resp. at 2 (Apr. 14, 2011). McCain 2008 claims that using the deposit date is an established convention among large campaigns seeking to mitigate the logistical hurdles of reporting the actual dates of receipt for thousands of individual contributions. *See* Resp. to Notif. at 2. The Committee points to the Commission's Financial Control and Compliance Manual for Presidential Primary Candidates Receiving Public Financing ("Compliance Manual"), which instructs presidential campaigns to maintain records showing the date of receipt for each contribution and states that, "[u]nless there is evidence that contributions are not deposited promptly upon receipt, the date of deposit will normally be considered to be the date of receipt." *See* Resp. to Notif. at 2; Supp. Resp. at 2, *citing* Compliance Manual at 46, <http://www.fec.gov/pdf/Compliance2000.pdf>.

McCain 2008's reporting methodology for joint fundraising receipts is contrary to Commission regulations, Commission precedent, and the Compliance Manual cited by the Committee. The applicable regulation and the parallel Explanation & Justification clearly state that although distribution of joint fundraising proceeds may be delayed until expenses are paid, for reporting and limitation purposes, the date of receipt of such contributions by a participating political committee is the date that the contribution is received by the fundraising representative.

13044341603

11 C.F.R. § 102.17(c)(3)(iii); *see* Transfer of Funds; Collecting Agents, Joint Fundraising Committees, 48 Fed. Reg. 26296, 26299 (June 7, 1983).

Contrary to the contention of the Committee, moreover, the Compliance Manual section cited by McCain 2008 does not apply to joint fundraising contributions. First, the transfer from the joint fundraising representative provides "evidence that contributions are not deposited promptly" upon their initial receipt. Thus, even by its own terms, this section does not apply. Second, the Compliance Manual contains explicit direction for reporting joint fundraising contributions. According to the Compliance Manual, publicly funded presidential primary committees should follow the procedures at 11 C.F.R. § 9034.8(c) requiring the itemization of joint fundraising receipts as contributions from original contributors to the extent required under section 104.3. *See* Compliance Manual at 18. The Compliance Manual further emphasizes that a "major" element in the regulations is that such contributions are considered received by the participating committee on the date of receipt by the joint fundraising representative. *Id.* at 19.

The Committee's arguments do not alter the fact that McCain 2008 failed to report the dates on which its joint fundraising representatives originally received contributions totaling \$22,257,684.17. Accordingly, the Commission found reason to believe that John McCain 2008, Inc. and Joseph Schlunckler in his official capacity as treasurer violated 2 U.S.C. § 434(b).

B. Misreporting of Transfers to GELAC

A committee that receives an excessive contribution may remedy the excessive amount by refunding the excessive amount or by seeking a redesignation or reattribution within 60 days. 11 C.F.R. § 110.1(b)(5). If a contribution is redesignated by a contributor in accordance with section 110.1(b)(5), the treasurer of the authorized political committee receiving the contribution is required to report the redesignation in a memo entry on Schedule A of the report covering the

13044341604

reporting period in which the redesignation is received. 11 C.F.R. § 104.8(d)(2)(i). The first part of the memo entry must disclose all the information for the contribution as it was originally reported on Schedule A. *Id.* The second part of the memo entry must disclose information on the contribution as it was redesignated by the contributor, including the date the redesignation was received and the election for which the contribution was redesignated. *Id.*

The Committee redesignated a total of \$13,782,264 in primary contributions to GELAC. A sample review of these redesignated contributions was performed to test the timeliness of the redesignations and compliance with itemization and disclosure requirements. A projection of primary redesignations to GELAC indicated that \$1,989,693 or 14.4 % of these redesignations were not itemized in memo entries on McCain 2008's disclosure reports.

McCain 2008 stated that the Committee's "regular and intended practice" was to include memo entries with all contributions it redesignated to GELAC. *See* Supp. Resp. at 1. In an attachment, the Committee included a page from its 2008 April Monthly report showing the itemization of a single redesignated contribution. *Id.* at Attach. A. In its response to the audit, McCain 2008 stated that the failure to include memo entries for those redesignations was inadvertent and will be corrected through the amendments to the relevant disclosure reports. *See* Resp. to Notif. at 3.

Because McCain 2008 failed to itemize in memo entries \$1,989,693, or 14.4 % of these redesignations, on its disclosure reports, the Commission found reason to believe that John McCain 2008, Inc. and Joseph Schmuckler in his official capacity as treasurer violated 2 U.S.C. § 434(b).

13044341605